(24)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 170

ARTHUR H. STOIKE,
Petitioner-Respondent Below,

—against—

FIRST NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

DANIEL WILLIAM LEIDER,
Counsel for Petitioner.

ROBERT S. GARSON,
Of Counsel.

THE COURT PRESS, N. Y. C.

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OCTOBER TERM, 1943.

No.

ARTHUR H. STOIKE,
Petitioner-Respondent Below,

—against—

FIRST NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant Below.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Arthur H. Stoike, respectfully shows:

1. Application for Leave to Submit Petition on Less Than the Required Number of Copies of the Record.

Petitioner has been unable to secure the required number of copies of the record and respectfully moves this Court that this petition be submitted and accepted by this Court on less than the required number of copies.

2. Summary Statement of the Matter Involved.

This action was brought to recover overtime pay under the Fair Labor Standards Act of June 25th, 1938 (52 Stat. 1060, Ch. 676; 29 U. S. Code, Sec. 201, et seq.) and was submitted to the Supreme Court of the State of New York, Appellate Division, First Department, on an

agreed statement of facts, pursuant to Sections 546 and 548 of the New York Civil Practice Act. On the decision of the court, judgment in favor of the plaintiff petitioner was entered on July 21st, 1942. By permission of the Supreme Court, Appellate Division, First Department, the defendant, First National Bank, appealed to the Court of Appeals of the State of New York. That court reversed the Appellate Division and directed judgment in favor of the defendant. This petition is on behalf of the plaintiff, Arthur H. Stoike.

Summarized, the facts are these: The defendant is a national banking association, originally chartered in 1863, which ranks amongst the largest national banks in the country (pp. 2-8, fols. 4-23). It does a general business both for customers located within and without the State of New York, numbering among them railroads, insurance companies, automobile manufacturers and others (pp. 2-9, fols. 5-25). The defendant bank accepts for collection from its customers and undertakes the collection of checks, drafts, coupons and commercial paper of all kinds, payable within the State of New York, and at other places throughout the country (p. 9, fols. 26-27). The bank also undertakes the forwarding of funds within the State of New York and all over the country (pp. 11-12, fols. 32-35). The bank lends money to borrowers located within the State of New York, and in other states against notes and loan agreements, with or without collateral (p. 12, fols. 35-36). Collateral may exist of conditional sales contracts or the like in connection with equipment purchases (p. 12, fols. 35-36). In short, defendant bank engages in a general commercial banking business as well as a trust company business (pp. 9-14, fols. 25-41). Defendant also undertakes some production for commerce in that it prepares cashier's check and customer's credit reports, which are used in and transmitted in interstate commerce (p. 14, fols. 40-41). Many of the other services

performed by the bank are actually production of goods under the definitions given in the Act.

On November 29th, 1937 plaintiff was employed by the defendant for a six night week, at eight hours a night, or forty-eight hours per week, as a nightporter in and about the building at No. 2 Wall Street, New York City (p. 16, fol. 48). For the purpose of this action it was specifically stipulated that the plaintiff was an employee of the defendant (p. 2, fol. 4). The building houses defendant's banking facilities and contains in addition a large number of floors which are rented out as office space (pp. 2-3, fols. 6-7). In the period during which the Fair Labor Standards Act was in effect, plaintiff worked forty-eight hours per week for fifteen weeks (p. 18, fol. 54). The plaintiff during six of the fifteen weeks in question devoted approximately one-half of his working hours to cleaning in and about the actual banking premises (p. 18, fol. 54). During this entire period plaintiff's salary was $27.00 per week, or at the rate of $.5625 per hour (p. 19, fol. 55). He received no overtime pay.

The Court of Appeals said in its opinion that

> "* * * Plaintiff does not claim that we are dealing with a problem involving 'the production of goods for commerce'."

The Wage and Hour Division of the Department of Labor appeared in the Court of Appeals by permission of the Court of Appeals as amicus curiae and was permitted to argue. A claim as to production for commerce was made by the Wage and Hour Division and is and was concurred in by plaintiff. The Court of Appeals found that the cleaning operations which plaintiff was required to perform in defendant's banking quarters were not so closely related to the many banking services performed that we can say as a matter of law that plaintiff's cleaning was

a part of such banking services, and, therefore, that he was "engaged in interstate commerce". The Court of Appeals in an opinion by Judge Lewis reversed the Appellate Division and directed judgment for the defendant. It is from this decision of the Court of Appeals that petitioner comes praying for a Writ of Certiorari.

3. Jurisdiction.

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is April 15th, 1943. The original remittitur is dated April 16th, 1943. The remittitur was thereafter amended by order of the Court of Appeals dated May 27th, 1943. An order making the judgment of the Court of Appeals, the judgment of the Supreme Court of the State of New York, was entered in the Appellate Division of the Supreme Court, First Judicial Department, on the 19th day of June, 1943. Judgment on the remittitur was entered in Supreme Court, State of New York, on the 8th day of July, 1943. The statute granting the power to review herein is Judicial Code, Sec. 237(b), U. S. Code, Title 28, Sec. 344(b). There is here involved the Fair Labor Standards Act of June 25th, 1938, 52 Stat. 1060, Chapter 676; 29 U. S. Code, Sec. 201 et seq., and the Court of Appeals of the State of New York decided against plaintiff's right to a recovery thereunder. The statute is set forth at length in the appendix. The amended remittitur recites that "this cause was brought under the provisions of a federal statute, namely, the Fair Labor Standards Act of June 25th, 1938 (52 Stat. 1060, Ch. 676; 29 U. S. Code, Sec. 201 et seq.), and an interpretation of that statute was necessarily involved in the decision by this Court".

The following case is believed to sustain the jurisdiction of the Supreme Court of the United States:

> *Pederson* v. *Fitzgerald Construction Co.*, decision handed down February 8, 1943, 63 S. C. 558.

In the foregoing case a writ of certiorari was allowed by this Court under the identical statute here involved and under identical circumstances, the Court of Appeals having held that the employee was not doing such work as to be covered by the Fair Labor Standards Act.

This case is within the jurisdictional provisions in that this action was brought under the Fair Labor Standards Act of June 25th, 1938 (52 Stat. 1060, Ch. 676; 29 U. S. Code, Sec. 201, et seq.). A final judgment has been rendered in this cause by the Supreme Court of the State of New York on remittitur of the Court of Appeals of the State of New York, the highest Court of the State of New York in which a decision in the suit could be had.

4. Reasons for Issuance of Writ.

1. The Court of Appeals of the State of New York has decided highly important questions based on the interpretation and application of a United States Statute. This was the first time this question was presented to the State Court of Appeals and if this Court grants certiorari, it will be the first time that this court will consider the application of the statute to this set of facts.

2. The decision of the Court of Appeals of the State of New York is directly in conflict with the decisions of this Court under similar but more limited statutes, and with the decisions of this Court under this statute.

3. There are a large number of cases presently pending in which the same question arises, and a larger number with similar questions. Many, if not all of these cases, are awaiting the disposition of this appeal can be disposed of, if this court will grant this petition and decide this case on the merits.

4. There are presently pending similar cases in which the lower court has taken an opposite point of view from that of the Court of Appeals in the instant case, and a decision of this court on the question here presented is necessary as a guide when this question is again presented.

ARTHUR H. STOIKE,
Petitioner.

By DANIEL WILLIAM LEIDER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

ARTHUR H. STOIKE,
Petitioner-Respondent Below,

—against—

FIRST NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant Below.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the Supreme Court, Appellate Division, First Department, granting judgment to the plaintiff is found on pages 33 to 39, folios 97 to 117, of the record. It is reported in 264 App. Div. 585. The opinion of the Court of Appeals is found at page 51 of the record, and has not been officially reported at the time of the preparation of this brief.

Jurisdiction and Statement of the Case.

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

Specification of Errors.

1. The Court of Appeals of the State of New York erred in holding that the "cleaning operations which plaintiff was required to perform in defendant's banking quarters were not so closely related to the many banking services performed there" as to be a part of such banking services so that "plaintiff was 'engaged in' interstate commerce."

2. The Court of Appeals of the State of New York erred in reversing the judgment for the plaintiff for overtime pay and in directing judgment for the defendant.

3. The Court of Appeals of the State of New York erred in holding that the defendant was in no wise engaged in the production of goods for commerce.

Argument.

POINT I.

Defendant, First National Bank of the City of New York, is engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

A. Banking Is a Commercial Activity and Banks Are Engaged in Commerce.

The modern commercial bank is a direct descendant of the artisan in gold and silver who bought and sold specie as a commodity. In the course of time the worker in the precious metals acted as a depositary for such metals in behalf of their owners; undertook the trans-

port of such metals; and from that point evolved something akin to our modern banking. Throughout the history, the banker has been a leader in and an integral part of commerce. Instead of buyers and sellers of precious metals and a reservoir from which those precious metals could be borrowed, banks have become buyers and sellers of credits and reservoirs of such credits from which credit could be borrowed. The commodity which banks have dealt in has not changed:—its form has merely become more fluid in that today banks use the symbol to represent the commodity: gold. Instead of specie a bank now deals in credit of one sort or another, whether it be the credit of a government as evidenced by the government's promise to pay or the credit of an individual as evidenced by an individual's check. Whether specie or credit, the thing dealt in is the current medium of exchange.

In *Osborne* v. *Bank of the United States,* 9 Wheat 738, at 860, 861, this court stated that banks were in trade from time immemorial, the original banking business being trade in specie. In *Gibbons* v. *Ogden,* 9 Wheat 1, at 229, 230, this court stated:

> "Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, and various mediums of exchange become commodities and enter into commerce."

So the dealing of a bank in mediums of exchange, a dealing which is the very soul of the banking business, is commerce.

The ingress and egress of persons has been held to be commerce. *Passenger cases,* 7 Howard, 283, *Head Money cases,* 112 U. S. 580; *Ekeii* v. *U. S.,* 142 U. S. 651. That

the ingress or egress of goods including precious metals is commerce goes without saying.

A bank may be said to deal not only in the medium of exchange but, to use an economic word of art, the "place utility" of cash. Through the bank, its customer without the actual transmission of specie can pay a bill in Chicago, while his only credits are in New York. The bank provides its customers with "place utility". A bank deals in the transportation of funds as a railroad deals in the transportation of commodities. A bank like a railroad is an instrumentality of commerce.

Commerce itself is a two way road. On one side manufactured goods go from producer to consumer; on the other, credits go from consumer to producer. If either side of the road is obstructed commerce ceases. There can no more be commerce without payment than there can be commerce without the manufacture or production of goods. If the manufacturer produces the goods which come up one side of the road to the consumer, the bank supplies the goods which go down the other side of the road from the consumer to the producer.

The defendant is no different than any other commercial bank except insofar as its commercial importance is greater due to its size. The defendant bank had resources in 1938 of substantially over one-half billion dollars (pp. 5-6, fols. 15-17). Its commercial importance was such, that it was impelled to do business in a building which, with the land on which it was situated, was assessed by the City of New York for six and a half million dollars (p. 2, fol. 6); a building situated in the heart of what has become and was in 1938 the world's financial center (p. 2, fol. 6); a location which cost the bank a rental which must have been approximately a half million a year, a figure arrived at by taking interest at 6% on the value placed upon it by the bank in its financial state-

ments and adding to it the deficit arrived at from the operation of the building (p. 3, fol. 7). The defendant bank has customers in every sort of business for whom it does a general commercial banking business. Thus for these customers engaged in interstate and foreign commerce it does precisely those things which have just been shown to be part and parcel of commerce itself.

The decisions of this court in cases such as *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1; *Associated Press* v. *Labor Board*, 301 U. S. 103, and *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, are here in point. In this connection also the defendant's membership in the New York Clearing House and the Federal Reserve System is important (p. 9, fol. 25). Thus it appears that the defendant is more than facilitating commerce; its business, banking, is commerce.

B. The Defendant Was Engaged in Interstate Commerce.

If banking is a commerce, this defendant's banking was interstate commerce. The defendant undertakes transactions for exchange and maintains deposits in other banks, or at least has funds coming from other banks as shown by its annual statement (pp. 5-8, 11, fols. 15-23, 32, 33). For example, in 1938, the defendant's annual statement shows as due from banks the sum of almost $4,000,000.00 (pp. 5-8, fols. 15-23). The actual shipments of gold to and from the United States in normal times was unquestionably affected by the foreign exchange business undertaken by this defendant at the request and in the interest of its customers.

In *Western Union* v. *Texas*, 105 U. S. 460, it was claimed that the transmission of messages between the states was

not interstate commerce. This court held in substance that a telegraph company occupies the same relation to commerce as a carrier of messages as a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their business in different ways and their liabilities are in some respects different, but they are both indispensable to those engaged to any extent in commercial pursuits. Can less be said of the defendant bank? For the transmission of money is more directly connected with commerce than the transmission of intelligence. The transmission of intelligence is an aid to business. The transmission of money is business itself.

C. The Defendant Was Engaged in the Production of Goods for Commerce.

As before pointed out the defendant prepares cashier's checks, credit reports and so forth (pp. 11, 14, fols. 33, 40, 41). The word "goods" as used in the act is defined in Section 3(i) as:

> "'Goods' means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Produced is defined in Section 3(j) as follows:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have engaged in the production

of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Thus, the defendant directly produced certain goods for commerce, and indirectly is engaged in production within the Act in that it transports specie and renders its customers an equivalent service in providing for them a "place utility" of cash. In a sense then, a bank's whole business is production in commerce as that term is defined in the Fair Labor Standards Act.

The bank in furnishing credit information, transmitting intelligence across State lines, financing the sale and purchase of goods to and from other States, sending out and receiving drafts with bills of lading attached etc., engage in activities involving the physical distribution of goods in interstate commerce and therefore production in commerce. Plaintiff bears the same relation thereto that employees in *Kirschbaum* v. *Walling*, 316 U. S. 517, bore to the production of goods for commerce carried on in that building.

The Administrator of the Wage and Hour Division, so specifically urged before the Court of Appeals of the State of New York, that the defendant was engaged in production was a major part of the first point of the brief of the Administrator submitted as *amicus curiae* to the Court of Appeals. That point was *"Plaintiff was engaged in commerce and/or the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938"*.

The foregoing distinguishes the instant case from those involving office buildings, as to which this court recently

denied certiorari. *Tommy Johnson* v. *Dallas Downtown Development Co.* Certiorari denied April 19th, 1943. No official citation.

There are presently pending three cases in which the facts are or may be on all fours with those in the instant case. Those cases are *Lofther* v. *First National Bank of Chicago*, 48 F. Supp. 692 (6 Labor Cases, par. 1659). *Lorenzetti* v. *American Trust Company*, 45 F. Supp. 128 (6 Wage and Hour Cases 269). *Johnson* v. *Hamilton National Bank*, (6 Labor Cases, par. 281). Of these cases only the decision in the *Lofther* case agrees with that of the Court of Appeals in the instant case. In the *Lofther* case, so far as the decision goes, there was no evidence that the employees involved performed any services in the private banking quarters of the bank. The District Court, referring to the services performed by the employees, said:

> "They operate the elevators and clean and patrol in the halls and offices in an office building in downtown Chicago."

In *Lorenzetti* v. *American Trust Company*, the identical question here presented was decided in favor of the plaintiff. In *Johnson* v. *Hamilton National Bank*, the Tennessee Chancery Court overruled a demurrer to a complaint involving so far as the decision goes facts identical with those in the instant case.

If the defendant, as is apparently the case, is engaged in production, the instant decision is contrary to the decisions of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Arsenal Building Corporation* v. *Walling*, 316 U. S. 517.

POINT II.

Plaintiff's work was so closely connected with the interstate activities of the defendant as to be a part thereof within the meaning of the Fair Labor Standards Act.

This court indicated in the majority decision in *McLeod v. Threlkeld* (Decision handed down June 7th, 1943. No official report yet) that it would not hold decisions under the Federal Employers Liability Act completely applicable under the Fair Labor Standards Act, or else reversed certain extreme decisions under the Federal Employers Liability Act.

Nevertheless, decisions under that statute which are not extreme, which pass on the question of closeness to interstate commerce and which seem to cover much the same points, should be helpful. The Appellate Division held that—

> "Plaintiff's employment bore a sufficiently close relation to defendant's banking business to justify the holding that he was engaged in commerce within the meaning of the Act" (p. 36, fol. 107).

In so holding, the lower court was amply sustained by the authority of decisions of this court under the Federal Employers Liability Act.

Decisions under the latter Act can be analyzed, and the broader rules thereunder as set forth by this court, can be stated. For this purpose the factual situations involved can be divided into three types: (a) movables, (b) supplies, and (c) plant. As to the movables and supplies we are not here concerned, except so far as the

general run of cases thereon would sustain the decision of this court in the *Threlkeld* case. Plant cases cover situations involving the repair or maintenance of fixed equipment used at least in part in interstate commerce, such as repairs to bridges used in part in interstate commerce; cleaning tracks used in part in interstate commerce of wreckage; cleaning tracks or yards so used of weeds or rubbish, changing ties and so forth. This court held in *Pederson* v. *Delaware, L. & W. R. R.*, 299 U. S. 146, that an employee injured while repairing a bridge used both in intra and interstate commerce was covered by the Federal Employers Liability Act.

In *Pederson* v. *Fitzgerald Construction Co.*, 63 Sup. Ct. 558, this court held the Fair Labor Standards Act equally applicable to the same work.

In *Plass* v. *Central New England Ry. Co.*, 242 U. S. 353, this court held that an employee injured while cleaning tracks or yards used in interstate commerce was covered by the Federal Employers Liability Act. There would seem to be little question that were the same question to arise under the Fair Labor Standards Act the employee should be found to be covered.

The railroad tracks and the freight yards are equivalent to the private portions of the bank. There the cashiers and tellers prepare for transmittal in interstate commerce and start on their way the instruments for the transmission of funds with which they deal, just as in the freight yards, the railroad employees start the freight car on its way in interstate commerce. The clerk of a bank in banking quarters deals in actual interstate commerce while in process of transmission, just as does the engineer of a locomotive.

There is a distinction between the public and private portions of the banking premises, that is neither nebulous

or far-fetched, for it appears in the stipulation of facts on which this action is based. At page 16, folio 47, the stipulation reads:

> "Inasmuch as maintenance and operation employees are not bonded, they are not permitted during banking hours to enter any part of the banking quarters other than the space opened to the public, unless accompanied by the bank guard. During other than banking hours they are under the general surveillance of a bank guard, when working in parts of the banking quarters other than those open to the general public."

The position of the plaintiff in the instant case is in all respects analogous to that of the employee in such cases as *Plass* v. *Central New England Ry. Co., supra.* In both the cleaning is necessary maintenance work on an instrumentality of commerce which may aid on its way, either interstate or intrastate commerce without distinction.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its Appellate Jurisdiction; and that to such an end a writ of certiorari should issue to the Supreme Court of the State of New York.

DANIEL WILLIAM LEIDER,
Counsel for Petitioner.

ROBERT S. GARSON,
Of Counsel.

APPENDIX.

[*For Convenience of Court and Counsel Appendix Is Bound in on the Opposite Page.*]

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee.

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages tobe paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act. 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

Supreme Court of the United States

October Term, 1943

No. 170

ARTHUR H. STOIKE,

Petitioner,

against

THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOWELL WADMOND,
Counsel for Respondent.

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Of Counsel.

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Supreme Court of the United States

October Term, 1943

No. 170

ARTHUR H. STOIKE,

Petitioner,

against

THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The petitioner seeks a writ of certiorari addressed to the Court of Appeals of the State of New York to review a decision of that Court to the effect that a night porter engaged in dusting, scrubbing and cleaning premises occupied by respondent and public corridors and washrooms in the tenant space of the First National Bank Building was not covered by the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A. Sections 201-219).

This controversy was submitted to the Appellate Division of the Supreme Court of the State of New York, First Department, pursuant to Sections 546-8 of the New York

Civil Practice Act upon an agreed statement of facts, wherein petitioner claimed he was entitled to overtime compensation in accordance with the maximum hours provisions (Section 7a) of the Federal Fair Labor Standards Act, and the respondent denied that petitioner was so entitled. The Appellate Division granted judgment for the petitioner (264 App. Div. 585) and granted leave to respondent to appeal to the Court of Appeals of the State of New York, with a stay of judgment pending appeal, certifying that in its opinion a question of law was involved which ought to be reviewed by the Court of Appeals. The Court of Appeals reversed and entered judgment for respondent herein (290 N. Y. 195). The opinion of the Court of Appeals is attached hereto in an appendix, to which respondent respectfully refers this Court for a concise and complete statement of the position of respondent herein.

Statement of Facts

Petitioner was hired as a night porter to clean in such portions of the office building owned by respondent as were specified from time to time by the head night porter (3, 49).* The operation of the building was under the management of a real estate management agent. Petitioner was in the employ of respondent and on the payroll of the real estate management company for a period of 25 weeks subsequent to October 24, 1938, the effective date of the Fair Labor Standards Act, until April 15, 1939 when he voluntarily terminated his employment, and during such period was subject to the control of the building superintendent, who, like petitioner, was also on the payroll of the real estate management agent. Petitioner dusted tables, chairs, etc. and scrubbed floors and stairs in the banking quarters and mopped and cleaned the public cor-

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*References are to record folios.

ridors and wash rooms in the tenant space of the building (49, 50). While during the early part of his employment, both before and for a short time after the Fair Labor Standards Act became effective, petitioner did considerable work in the early part of each night in the banking quarters, during the latter part of his employment petitioner spent the greater part of his time cleaning the public corridors and washrooms on the floors occupied by tenants (50, 51).

During 15 of the 25 weeks of petitioner's employment subsequent to the effective date of the Fair Labor Standards Act petitioner worked forty-eight hours a week. These were the only weeks during that period in which petitioner worked hours in excess of the maximum 44 work week prescribed by the Act for the same period (53). Petitioner received a regular weekly wage of $27 a week or an average of 56.25 cents an hour on the basis of 48 hours a week (55). Petitioner claims he is entitled to overtime compensation in the amount of $50.63 plus a like amount as liquidated damages and the costs of this action (55, 56).

Respondent was chartered in 1863 and its charter has been renewed from time to time. Its sole place of business is No. 2 Wall Street, New York City. Outside thereof it maintains no offices, has no agents, and keeps no funds on deposit other than funds deposited with the Federal Reserve Bank of New York (5). Solely at said place of business, respondent performs the usual banking services for its customers, who include individuals, partnerships, corporations, banks and insurance companies. The customers, whether corporate or individual, whether depositors, borrowers, fiduciary customers or others, are located within and without the State of New York and are engaged in many lines of business, some of which constitute interstate commerce and some of which do not (25). The services performed for such customers include: conducting deposit accounts, lending money, making credit inquiries, and serving as executor, testamentary trustee, trustee under

inter vivos trusts, trustee under corporate indentures, depositary and escrow agent, transfer agent, or custodian of securities (26-41).

The building in which petitioner worked consists of 21 stories, the first four of which are occupied by the banking quarters of respondent and the remainder of which are rented to tenants as office space (6).

Pursuant to agreement dated October 27, 1932 between respondent and Horace S. Ely & Company, the latter became rental and management agent for the building, and since that time the latter has had complete charge of the maintenance and operation of the entire building, including the banking quarters.

Upon the basis of the foregoing facts, respondent claims that the Fair Labor Standards Act is wholly inapplicable and that petitioner is entitled to no recovery thereunder.

POINT I

To be entitled to judgment for overtime compensation under the Fair Labor Standards Act, it is necessary for petitioner to prove that he was engaged in interstate commerce or in the production of goods for interstate commerce.

Section 7(a) of the Fair Labor Standards Act in express and unmistakable terms grants the benefits of extra compensation for hours worked in excess of the maximum established therein only to those employees who are engaged in interstate commerce or in the production of goods for such commerce.

This Court in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524 (1942) expressly held that the applicability of the Act depends solely upon whether each particular employee's activities constitute interstate commerce or

the production of goods for interstate commerce and not whether the nature of the employer's business is such, in these words:

> "But the provisions of the Act expressly make its application dependent upon the character of the employees' activities."

Warren-Bradshaw Drilling Co. v. *Hall,* 317 U. S. 88, and *McLeod* v. *Threlkeld,* 7 Labor Cases, § 51,162, are to the same effect.

POINT II

Petitioner was not engaged in interstate commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938.

A. Petitioner's activities, considered alone and without relation to any other activity carried on in respondent bank building, obviously did not constitute interstate commerce.

Petitioner's work in the banking quarters consisted of dusting chairs and tables, etc. and scrubbing floors and stairs (49). In the tenant space of the building, where during the latter part of his employment the greater part of his time was spent, petitioner mopped and cleaned the public corridors and washrooms (50-1). Such activities considered alone and without relation to any other activities could not conceivably constitute interstate commerce. They neither transcended State lines nor partook of the nature of commerce. In its opinion, the Court of Appeals at page 200 states:

> "In the argument before us counsel for the plaintiff conceded that dusting and cleaning, as performed under ordinary circumstances, do not constitute interstate commerce."

B. This Court expressly has held in several recent cases that an activity "convenient" or "necessary" to or "affecting" interstate commerce is not sufficient to satisfy the express requirement of the Fair Labor Standards Act that petitioner be engaged in interstate commerce itself.

In *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941) the Court, by Mr. Justice FRANKFURTER, drew a sharp distinction between being in interstate commerce and being in some activity merely affecting such commerce, in the following language at pages 351, 355:

> "* * * The 'commerce' in which these methods are barred is interstate commerce. Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its 'break and take' assortments in Illinois as 'using unfair methods of competition in (interstate) commerce.' When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." (Citing among other laws, the National Labor Relations Act, Sections 2(7), 9(c) and 10(a).)
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> * * * * *
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> "The problem now before us is very different from that which was recently presented by *United States* v. *Darby* * * *. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

In *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (1942), this Court declared that the judicial task in each case is to determine whether Congress exercised its constitutional power to such an extent as to embrace the particular facts involved. The question to be answered is not what Congress had the power to do but what Congress did. Mr. Justice FRANKFURTER at page 520, *et seq.* wrote:

> "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.
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> "The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. See, *e.g., Virginian Ry. Co.* v. *Federation,* 300 U. S. 515. Thus, while a phase of industrial enterprise may be subject to control under the National

Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law. Compare, for example, *United Leather Workers* v. *Herkert*, 265 U. S. 457, and *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, with *Labor Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, and *Labor Board* v. *Fainblatt*, 306 U. S. 601. Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, with *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

"We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. One need refer only to the history of Congressional control over the rates of intrastate carriers which affect interstate commerce, and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who 'shall, in any way directly or closely and substantially, affect' interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when

the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

"* * * The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'. H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston, E. & W. T. Ry. Co.* v. *United States, supra,* in that it was specifically made applicable to intrastate production which competed with goods produced in another State. S. 2475, 75th Cong., 3rd Sess., as recommitted December 17, 1937, § 8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra,* as reported April 21, 1938; see H. Rep. 2182, *supra.*

"Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce', * * *"

In *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570, this Court by Mr. Justice DOUGLAS said:

"In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess.,

p. 5; 83 Cong. Rec., 75th Cong., 3rd Sess. Pt. 8, p. 9169. Moreover as we stated in *Kirschbaum Co.* v. *Walling, supra,* 522-523, Congress did not exercise in this Act the full scope of the Commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transactions 'affecting commerce.' But as we noted in the *Kirschbaum* case the Act did not go so far. * * *

"The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra,* p. 524."

Similarly in *Higgins* v. *Carr Bros. Co., Inc.,* 317 U. S. 572, this Court by Mr. Justice DOUGLAS said at page 574:

"* * * Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.,* that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act * * * and extended federal control to business 'affecting commerce'. But as we pointed out in *Kirschbaum* v. *Walling,* 316 U. S. 517, this Act did not go so far, but was more narrowly confined."

In *Overstreet, et al.* v. *North Shore Corporation,* 318 U. S. 125, Mr. Justice MURPHY stated, at page 128:

"Our starting point is respondent's concession that no question of constitutional power is involved, but only the ascertainment of Congressional intent,

that is, did Congress mean to include employees such as petitioners within the Act. In arriving at that intent it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce. See *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522-23; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564."

In *McLeod* v. *M. C. Threlkeld, et al.,* 7 Labor Cases ¶51,162, this Court by Mr. Justice REED wrote as follows:

"In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' Sections 6 and 7. See the discussion and reference to legislative history in *Kirschbaum* v. *Walling,* 316 U. S. 517, and *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564. The selection of the smaller group was deliberate and purposeful."

It is therefore beyond contradiction that the petitioner must have been engaged in interstate commerce itself, rather than an activity "convenient" or "necessary" to or "affecting" interstate commerce, if he is to be included within the "commerce" coverage of the Act.

C. Petitioner's cleaning, dusting and mopping, either in the banking quarters or in the tenant space of the bank building, were not so closely related to any of the banking services performed in the banking quarters (assumed for the purpose of argument, but not conceded, to be interstate commerce) as to be practically a part thereof and therefore themselves to constitute interstate commerce.

Just as under the Federal Employers' Liability Act (45 U. S. C. A. § 51, *et seq.*), prior to its amendment in 1939, compensation for injury was provided only for those employees who suffer injury while employed in interstate commerce, so under the Fair Labor Standards Act of 1938 the benefits of overtime compensation are extended only to such employees as are engaged in interstate commerce or in the production of goods for such commerce. Cases decided under the former Act afford therefore a reliable criterion for determining under the Fair Labor Standards Act whether or not the activities of the petitioner constitute interstate commerce. In *Shanks* v. *Delaware, Lackawanna and Western Railroad Co.*, 239 U. S. 556, 558 (1915), this Court pronounced what has with monotonous regularity been recognized to be the "true test" in cases under the Federal Employers' Liability Act for determining whether or not an employee at the time of his injury was engaged in interstate commerce. That test was declared to be whether or not at such time despite the fact that the employer was engaged in interstate commerce, the employee was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

This Court in recent cases has applied the same test. In *McLeod* v. *M. C. Threlkeld, et al.*, 7 Labor Cases ¶ 51,162, Mr. Justice REED said:

> "In the present instance, it is urged that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities. It is said that this Court decided an

employee, engaged in similar work was 'in commerce', under the Federal Employers' Liability Act and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive.

"Judicial determination of the reach of the coverage of the Fair Labor Standards Act 'in commerce' must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum* v. *Walling, supra,* 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act.

* * * * *

"* * * The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

In *Overstreet, et al.* v. *North Shore Corporation,* 318 U. S. 125, Mr. Justice MURPHY wrote, at page 128:

"A practical test of what 'engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act (45 U. S. C. §§ 51 *et seq.*) which, before the 1939 amendments (see 53 Stat. 1404), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce'. 35 Stat. 65. * * *

"We think that practical test should govern here.

* * * * *

> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the Pedersen and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

In cases under the Federal Employers' Liability Act, application of the "true test" has resulted in decisions which in each instance have depended upon the degree of physical proximity of the particular activity of the employee at the time of injury to some specific interstate transportation engaged in by the carrier. The principal object for which carriers exist is, of course, transportation, which is the very essence of commerce. See *Chicago Rock Island & Pacific Railway Co.* v. *Wright,* 239 U. S. 548, 550 (1916). This Court has refused to permit a recovery under the Act by employees who might be said to be engaged in activities closely related to the general business of the carrier as a whole but only remotely related, although ultimately necessary, to the actual movement of trains. Only twice has the Court wandered from the path, in *Erie Railroad Company* v. *Collins,* 253 U. S. 77 (1920) and *Erie Railroad Company* v. *Szary,* 253 U. S. 86 (1920), in both of which it was held that the employee was employed in interstate commerce within the meaning of the Act when he was engaged in preparing supplies of water and sand for later use by interstate engines. Both cases were later expressly overruled in *Chicago & Eastern Illinois Railroad Co.* v. *Industrial Commission,*

284 U. S. 296, 299 (1932). The ground for overruling such decisions was that the relationship between the activities of the employee at the time of his injury and the interstate transportation, for the purpose of which the railroad existed, was too remote. The "true test" as to whether an employee was engaged in "interstate commerce" within the meaning of the Act was whether or not his activities at the time of injury had such a close physical relationship to the "interstate transportation" of the carrier as to be a part thereof. By the same token, the "true test" in the case at bar must be whether or not plaintiff's cleaning, dusting and mopping had such a close physical relationship to specific banking services performed in the banking quarters as to be practically a part thereof. It would, of course, first be necessary to find that the particular banking services constituted interstate commerce.

The Court did not make the same mistake it made in the two Erie Railroad cases again. Naturally, employees engaged in the actual movement of trains across state lines have been held subject to the Act. *Chicago Rock Island & Pacific Railway Co.* v. *Wright*, 239 U. S. 548 (1916). But if the injury were received at a time when the interstate journey had not yet begun or had definitely terminated, the Act had no application. *McCluskey* v. *Marysville & Northern Railway Company*, 243 U. S. 36 (1917); *Illinois Central Railroad Company* v. *Peery*, 242 U. S. 292 (1916). *Cf. Philadelphia & Reading Railway Company* v. *Hancock*, 253 U. S. 284 (1920).

Injuries sustained by employees during the repair or clearance of fixed instrumentalities in use in interstate commerce such as tracks, tunnels and bridges were covered by the Act. *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company*, 229 U. S. 146, 151 (1913); *New York Central Railroad Company* v. *Porter*, 249 U. S. 168, 169 (1919); *Plass* v. *Central New England Railway Com-*

pany, 221 N. Y. 472 (1917); *Pallocco* v. *Lehigh Valley Railroad Company,* 236 N. Y. 110, 114 (1913). But the Act did not cover injuries received in the course of the construction of a new track, tunnel or bridge intended for use by interstate trains. The connection between such activity and the interstate commerce to which it ultimately contributes was physically too remote. *Raymond* v. *Chicago, Milwaukee & St. Paul Railway Company,* 243 U. S. 43 (1917); *New York Central Railroad Company* v. *White,* 243 U. S. 188, 192 (1917); *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company,* 229 U. S. 146, 152 (1913) (*dictum*).

Just as injuries sustained in the repair of fixed instrumentalities in use in interstate commerce came within the scope of the Act, so likewise did injuries received by employees while repairing or working upon movable instrumentalities such as locomotives or cars used in interstate commerce and not removed from service so long as to eclipse their identification with such commerce. *Walsh* v. *New York, New Haven and Hartford R. R. Co.,* 223 U. S. 1, 5 (1912); *North Carolina Railroad Company* v. *Zachary,* 232 U. S. 248 (1914). On the other hand, such injuries were not compensable under the Act where the engine or car being repaired, although it had been used in interstate commerce just prior to the repairs and would probably be so used subsequently, had been out of such service for too long a period and was undergoing repairs of too extensive a nature. To bring the employee within the Act, it was necessary that the repairs be merely a short interruption in an interstate haul. *New York, New Haven & Hartford Railroad Co.* v. *Bezue,* 284 U. S. 415, 420 (1932); *Minneapolis & St. Louis Railroad Company* v. *Winters,* 242 U. S. 353, 356 (1917); *Baltimore & Ohio Railroad Company* v. *Branson,* 242 U. S. 623 (1917, reversing 128 Md. 678, 98 Atl. 225, 230).

Most of the cases discussed above involved principally the question of the relation between the activity of the employee at the time of injury and the interstate commerce of the railroad in terms of time. In other words, if the activity of the employee during which he was injured took place too long before or after the interstate commerce to which it contributed, the relationship was too remote for the one to become a part of the latter.

Even more pertinent and persuasive in the instant case are those Federal Employers' Liability cases in which there was considered the physical relationship of the injured employee's activity to the interstate transportation of the carrier in terms of the identity of that activity with the transportation of the carrier. In other words, the ultimate question to be answered in each case was whether the employee's activity physically partook of the nature of transportation (*i. e.,* banking here), or was a separate and distinct activity. As was pointed out above, injuries sustained by an employee while directly repairing cars or locomotives in use in interstate commerce were compensable under the Act provided the cars or locomotives had not been out of service too long. But injuries suffered by employees while repairing or caring for machinery or shops used in the repair of such cars or locomotives were not within the Act. The work he performed in the railroad shop or roundhouse other than on the cars or locomotives themselves ultimately contributed to the interstate transportation but did not possess the inherent character of interstate transportation. *Shanks* v. *Delaware, Lackawanna and Western Railroad Company,* 239 U. S. 556, 559 (1916); *Illinois Central Railroad Company* v. *Cousins,* 241 U. S. 641 (1916, reversing 126 Minn. 172, 148 N. W. 58); *Chicago & North Western Railway Co.* v. *Bolle,* 284 U. S. 74, 80 (1931). The principle upon which the decisions in the foregoing cases were founded was stated at page 559 of the *Shanks* case, as follows:

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis* case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

Exactly the same was true with respect to employees working with or upon supplies like coal or water for interstate locomotives. The Act applied to them if they were injured while directly coaling or watering such locomotives. *North Carolina Railroad Company* v. *Zachary*, 232 U. S. 248, 260 (1914); *Armbruster* v. *Chicago, Rock Island & Pacific Ry. Co.*, 166 Iowa 155, 147 N. W. 337, 346 (1914); *Southern Ry. Co.* v. *Peters*, 194 Ala. 64, 69 So. 611, 613 (1915). But if the injury occurred while the employee was engaged in mining, preparing or transporting the coal or other supplies for interstate locomotives prior to the actual loading of such supplies on the locomotives, the Act did not apply. Such activity of the employee, like that of the employee repairing machinery in the roundhouse, although it eventually contributed to the interstate transportation of the locomotive, did not partake of the nature of such transportation. Instead it was mining, fueling, or servicing. *Delaware, Lackawanna & Western Railroad Company* v. *Yurkonis*, 238 U. S. 439, 444 (1915); *Chicago, Burlington & Quincy Railroad Com-*

pany v. *Harrington*, 241 U. S. 177, 180 (1916); *Lehigh Valley Railroad Company* v. *Barlow*, 244 U. S. 183 (1917).

Under the Federal Employers' Liability Act the same principles have been applied with like results to the situation which most nearly resembles that presented in the instant case—namely, the injury to an employee while caring for or repairing a building or station owned by an interstate carrier and used by it in its interstate business. Such an employee has been held to be engaged in an activity of a type physically so different from interstate transportation as not to be a part of it.

In *Sullivan* v. *New York, New Haven & Hartford Railroad Co.*, 134 Atl. 795, 800 (Conn. 1926) the Court, after applying the "true test", held that a clerk in an interstate railroad station who was killed by the electric current while turning off the station lights after his regular clerking activities were completed, was not engaged in interstate commerce and that hence the state Workmen's Compensation Act rather than the Federal Employers' Liability Act applied. The Court reached its conclusion by comparing the employee's activity at the time of injury with the work of a station janitor similar to that of the plaintiff in the instant case. It stated at page 800:

> "If the decedent had been an employee of the defendant whose sole duty was to do janitor's duty at the station after all movement of goods or persons in commerce was over for the day, would he, while doing such work, be deemed to be engaged in interstate commerce, or in work so closely related to it as to be practically part of it? If the conclusion that he would not is correct as to such assumed employee, then the work which the decedent was engaged in at the time of the injury ought to be viewed from the same standpoint, and with a like result.
>
> "We are of the opinion that in so far as interstate commerce was concerned the janitor's work in which Sullivan was engaged when injured was a matter of indifference to interstate commerce; that, in fact, it was work 'out of commerce.'

> "In the instant case the current of electricity and the electric light, when being turned off, were not directly and immediately used in interstate transportation, and cannot reasonably be deemed a part of interstate commerce; the decedent, therefore, at the time of turning out the electric light, was not engaged in such commerce."

The New York courts are in accord with this view. In *Klochyn* v. *New York Central R. Co.*, 218 App. Div. 295, 296, 297 (3rd Dept., 1926) a carpenter injured while repairing a watchman's shanty at an interstate grade crossing in which the tools of a track repair gang were kept was held not to be engaged in interstate commerce so as to be subject to the provisions of the Act. The watchman himself was engaged in interstate commerce; so likewise was the track repair gang. But the carpenter's repair work on the shanty which housed both the watchman and the tools possessed so little of the nature of transportation as not to be a part of it. This was clearly pointed out by the Court as follows at page 296:

> "In the present case we think the claimant's work was too remote from interstate commerce. He was repairing the shanty to make it fit for its purpose, namely, to shelter the watchman and for the storage of tools. To the watchman, considering his health and welfare, the shanty was needful; to commerce, however, it was not directly essential; it was not so closely related to commerce as to be practically a part of it, a direct instrumentality of movement. Repairing the shanty is a step further removed from commerce movement than is the shanty itself and its use. As the shanty is needful to the watchman for shelter, so his clothing is needful to protect him while doing his work; still it could hardly be claimed that a man or woman who made necessary repairs to that clothing was engaged in interstate commerce. The fact that tools were kept in the shanty cannot affect the result. While the tools were stored they were withdrawn from commerce and it could hardly be said that every building in which track gangs kept their tools was directly connected with interstate commerce."

And the Court at page 297, after drawing an analogy between the shanty and an office building housing the clerks and officers of the railroad continued as follows:

> "* * * A carpenter repairing such an office building would not be held to be engaged in interstate commerce."

Upon exactly the same grounds the Court of Appeals in *Vollmers* v. *New York Central R. Co.*, 223 N. Y. 571 (1918), reversed a ruling by the Appellate Division, Third Department, to the effect that a plumber injured while repairing the pipes in an interstate passenger station was engaged in interstate commerce and came within the provisions of the Act. The Court relied upon *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556 (1916), discussed *supra*, as its authority.

Upon the same grounds the United States Supreme Court reversed a judgment of the Minnesota Supreme Court granting the benefits of the Act to an employee engaged in working upon an outhouse of an interstate passenger station. *Minneapolis & St. Louis Railroad Company* v. *Nash*, 242 U. S. 619 (1917), (reversing 131 Minn. 166, 154 N. W. 957).

The banking quarters, although essential to carrying on the banking functions, cannot be regarded as an instrumentality of interstate commerce, as for instance, a check, a draft or a note may be. The various documents of title used by banks may be instrumentalities of commerce, for they are employed in the actual transactions of commerce just as are railroad cars and tracks in transportation. But the banking quarters have no such particular identification with commerce itself, other than that the commerce must take place somewhere. They may more appropriately be compared with the railroad stations and buildings in the cases discussed above, in which without exception employees engaged in working in or upon such buildings were held not to be engaged in interstate commerce.

Moreover, the absurdity of comparing the relation between track workers on interstate railroads and the interstate transportation of such railroads with that between a night porter cleaning in the banking quarters and the bank's interstate banking functions such as the negotiation of bills, notes and checks need hardly be pointed out. Track clearance is by nature closely identified with transportation; but how can it reasonably be said that there is any such affinity between cleaning, dusting and mopping the banking quarters and, for example, the negotiation of bills, notes and checks? It cannot be said that cleaning in any way partakes of the nature of any of the usual interstate banking transactions. It is well-nigh impossible to conceive of an activity more remotely connected with interstate banking transactions than the cleaning activities of the plaintiff.

Plaintiff worked only at night when no banking activities whatsoever were carried on (49). *Sullivan* v. *New York, New Haven & Hartford Railroad Co.*, 134 Atl. 795 (Conn., 1926), *supra*. Never did he participate directly or indirectly in any activity even faintly resembling a banking function, not to speak of an interstate banking transaction. Nor did he ever handle any of the documents or other articles used in interstate transactions. His job, strikingly similar to that of the repairmen in the interstate railroad terminals noted above, was to dust tables, chairs, etc., and scrub floors and stairs in the banking quarters and to mop and clean the public corridors and washrooms in the tenant space (49, 50). The most that plaintiff can claim is that he worked in the same quarters where alleged interstate commerce transactions were carried on, and this, as was pointed out above, will not suffice to establish the necessary relationship.

The case of *Johnson* v. *Dallas Downtown Development Co.*, certiorari denied April 19, 1943, 318 U. S. 790, appears to be much in point. The petition for certiorari in that case stated that the petitioners were "elevator opera-

tors, maintenance men, porters and utility men employed in and necessary to the operation of Texas Bank Building, an office building owned and operated by the defendant, the majority of which building is occupied by persons engaged in commerce and in the distribution, sale, handling, and other processes of goods produced in commerce and for commerce, as alleged in their complaint." The petition also disclosed that the building located in Dallas, Texas, was occupied principally by offices of companies having their home offices outside of Texas and including many nationally known concerns, such as Pillsbury Flour Mills Company, Charles Scribner's Sons, Western Electric Company, American Blower Company, General Food Sales Co., Encyclopedia Britannica, and the manufacturers of such famous products as Old Dutch Cleanser, Lipton Tea, Jello, Maxwell House Coffee and Welch's Grape Juice. Other tenants were commission brokers, manufacturer's agents representing textiles, foods and machinery, and from these offices orders were solicited and instructions issued on which merchandise was shipped into the Southwest from factories in the East. Other offices were occupied by a selling subsidiary of oil well pumps manufactured outside Texas, a freight solicitor for an interstate railroad, the Brotherhood of Railway & Steamship Clerks affiliated with the American Federation of Labor. One of the offices was occupied by International News Service, a news collecting and disseminating cooperative. There were also advertising agencies, insurance companies, general contractors and consulting engineers, agencies soliciting national magazine subscriptions, an office engaged in making insurance investigations and reports, an office supply house and others. Six or seven of the petitioners were porters whose duty it was to clean up offices, empty cuspidors, clean waste baskets, keep the halls clean, paint the walls and floors on the inside of the building and clean both the private offices and also the halls and stairways of the building commonly used by tenants. The petition for certiorari states:

> "The work which the plaintiffs do is usual and customary work done in buildings and necessary to keep them clean in order to keep tenants in them * * *."

The United States District Court for the Northern District of Texas dismissed the complaint and held that the employees were not covered by the Fair Labor Standards Act. The United States Circuit Court of Appeals for the Fifth Circuit affirmed in 132 F. 2d 287, saying *inter alia*:

> "We do not think that Congress intended that the Act with respect to those who are only 'engaged in commerce' should be stretched and strained to cover every person whose labor is of use or convenience or labor which in some fashion contributes to the comfort or convenience of another who is so engaged."

Among the reasons relied on for the allowance of the writ, the petitioners in *Johnson* v. *Dallas Downtown Development Company,* stated that the decision of the Fifth Circuit "conflicts with decisions by District Courts in other circuits, appeals from which are now pending in other Circuit Courts of Appeal and likewise conflicts with decisions by various state courts, appeals from which are pending and which are still subject to application to this Court for certiorari * * *."

The petition then goes on to state that "In this connection petitioners would show that the following cases involving the identical question here in issue are pending in various courts, and a decision herein would be determinative of all of them." The petition then cites the case at bar in these words:

> "(b) *Stoike* v. *The First National Bank of the City of New York,* 38 N. Y. Supp. 2d 390, appeal pending in Court of Appeals of New York."

The petition in the *Johnson* case went on to recite:

> "In well-reasoned opinions, one state court and one federal court upon this precise point have held that such maintenance employees and elevator operators in a building tenanted as was this one by persons engaged in commerce were themselves in commerce within the meaning of the Act. The Appellate Division of the Supreme Court of New York so held in Stoike *v.* First National Bank of the City of New York, 36 N. Y. Supp. 2d 390, and so did the District Court for the Northern District of California in Lorenzetti *v.* American Trust Co., 45 Fed. Supp. 128."

It thus appears from the petition for certiorari in *Johnson* v. *Dallas Downtown Development Company* that the petitioners in that case felt that the issues in their case were the same as those raised in the case at bar. In this connection it is interesting to note that not only has the Court of Appeals of the State of New York in the case at bar held that the petitioner here is not within the coverage of the Fair Labor Standards Act, but the Circuit Court of Appeals for the Ninth Circuit in an opinion dated August 17, 1943 has reversed the case of *Lorenzetti* v. *American Trust Co.* (45 Fed. Supp. 128) and in holding that the petitioners, some of whom were porters who did mopping and dusting and emptying of waste baskets, etc. in banks and office buildings, said that:

> "Since the submission of the cases, the Supreme Court has decided McLeod *v.* Threlkeld, ... U. S. .....
> The employers there were a partnership with a contract to furnish meals to maintenance-of-way employees of an interstate carrier, the meals being cooked and served in a railroad car attached to a particular gang of workmen and set on the railroad track conveniently to the place of the gang's activities. The employee concerned worked for the partnership as a cook in this car. He was held not within the coverage of the Act, the court saying that 'The test under this present Act, to determine whether an employee is engaged in commerce, is not whether the

employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it'. It was thought that employee activities outside of this movement, so far as they are covered by the wage-hour regulation, are governed by the phrase 'production of goods for commerce'.

"Here, as there, the employees concerned are not in any sense engaged in production nor are their activities integrated with the production of goods. Cf. Kirschbaum Co. *v.* Walling, 316 U. S. 517. The sole argument made on their behalf is that they are 'engaged in commerce'. We are compelled to disagree. Their work appears to us even more remote from the movement or stream of commerce than was the work of the cook in McLeod *v.* Threlkeld, *supra.* The holding in that case is controlling.

"The judgments are accordingly reversed."

A proper interpretation of the decisions of this Court on this issue is found in the language of Judge LEWIS speaking for the Court of Appeals of the State of New York in the case at bar (290 N. Y. 195, 203) where it is said:

"In our endeavor to interpret the phrase 'engaged in commerce' we adopt and apply to our present problem the 'practical test' suggested in *Overstreet et al.* v. *North Shore Corporation,* 317 U. S. —— —(decided Feb. 1, 1943)—Was the plaintiff's work of dusting and cleaning the defendant's banking quarters so closely related to interstate commerce as to be 'in practice and in legal contemplation a part of it.' (See also *Pedersen* v. *D. L. & W. R. R. Co.,* 229 U. S. 146, 151; *Shanks* v. *D. L. & W. R. R. Co.,* 239 U. S. 556, 560.) By the application of that test we think that one of those 'areas' which Congress chose not to occupy when it fixed the scope of section 7 (a) was employment such as the plaintiff's. It is our conclusion that the cleaning operations which plaintiff was

required to perform in defendant's banking quarters were not so closely related to the many banking services performed there that we can say as matter of law that plaintiff's cleaning was a part of such banking services and therefore that he was '*engaged in*' interstate commerce. The plaintiff's work of cleaning and dusting the quarters in which the functions of banking are performed, although it may contribute remotely to the comfort and convenience of those whose services are vital to its business, is not a step in the process of banking. Indeed, as we consider the activities of those who conduct the vital functions by which the business of the defendant bank is accomplished, the essential characteristics of that portion of its banking service which is interstate commerce are lost before we reach the position held by the plaintiff. If, under the guise of construing section 7 (a), we extend its application beyond those employees who are 'engaged in' interstate commerce and include that vast number of employees whose work, like that of the plaintiff, only remotely *affects* commerce, we would extend the operation of the Act beyond its intended scope."

POINT III

Petitioner was not engaged in production of goods for interstate commerce.

The plaintiff in his petition for certiorari (p. 2) states:

"Defendant also undertakes some production for commerce in that it prepares cashier's check and customer's credit reports, which are used in and transmitted in interstate commerce (p. 14, fols. 40-41). Many of the other services performed by the bank are actually production of goods under the definitions given in the Act."

The petitioner then goes forward at pages 8 to 12 to prove that banking is commerce, rather than production. Again at page 12, the petitioner urges that banking is production of goods for commerce and at page 13 says:

> "In a sense then a bank's whole business is production in commerce as that term is defined in the Fair Labor Standards Act."

The petitioner goes on to say that:

> "The bank in furnishing credit information, transmitting intelligence across State lines, financing the sale and purchase of goods to and from other States, sending out and receiving drafts with bills of lading attached, etc., engage in activities involving the physical distribution of goods in interstate commerce *and therefore production in commerce.*" (Emphasis ours.)

That this argument is an afterthought is attested by the fact that in none of the briefs submitted by petitioner in the two lower courts is there any assertion that banking is production of goods for commerce. True it is, as set forth by petitioner herein, that the Administrator of the Wage and Hour Division as *amicus curiae* in the two lower courts submitted in its briefs a point entitled "Plaintiff was engaged in commerce and/or the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938." That the point of production was labored in these briefs is apparent from the very "and/or" entitlement of the point itself. The fact remains that the Appellate Division of the Supreme Court in its opinion specifically stated that:

> "This case, therefore, involves solely a situation where plaintiff's employer is engaged in commerce, but it is not a case where the employee was in any wise engaged in the production of goods for commerce * * * The question to be decided in this controversy is whether the plaintiff in view of the nature of the work which he performed is to be deemed engaged in interstate commerce within the meaning of the Act."

Moreover, the Court of Appeals in its opinion stated:

> "The defendant, for the purpose of the argument only, concedes that at least a part of the banking services performed in its banking quarters constitutes interstate commerce. It contends, however, and the Appellate Division has recognized that this—'* * * is not a case where the employee was in anywise engaged in the production of goods for commerce'. (264 App. Div. 585, 586.) Accordingly the defendant's argument goes to the narrow question whether the plaintiff, at the time of his overtime employment, was 'engaged in' interstate commerce within the intended meaning of section 7 (subd. a) of the Act."

These two statements by the Appellate Division of the Supreme Court and the Court of Appeals of themselves indicate definitely that the lower courts were of the opinion that the question of production for interstate commerce, as distinguished from interstate commerce, was not before them for consideration, and emphasizes the fact that production of goods for commerce is seriously raised here for the first time.

The "Summary of Argument" in the brief filed by this petitioner with the Court of Appeals states that:

> "The plaintiff-respondent will argue:
>
> "A. That the defendant was engaged in Interstate Commerce.
>
> "B. That the plaintiff's activities were so close to and so much a part of defendant's interstate business as to make such work a part of that interstate business even under such precedented statutes as the Federal Employers' Liability Act.
>
> "C. That the Fair Labor Standards Act was meant to be and is broader in scope than the Federal Employers' Liability Act.
>
> "D. That as a consequence the plaintiff is covered by the Fair Labor Standards Act * * *."

The Court of Appeals therefore was accurate when in its opinion it said: "* * * plaintiff does not claim we are dealing with the problem of 'production of goods for commerce.'"

The petitioner devotes a considerable portion of his petition to the argument that banking is interstate commerce and then argues that because the bank is engaged in interstate commerce it must also be engaged in production of goods for commerce. The petitioner's argument, carried to its conclusion, is either one of two propositions. His argument is either that because banking is necessary to the production and sale of goods in modern complex industrial society and allegedly petitioner's work is necessary to banking, therefore petitioner is engaged in production. Or else, it is that the drawing of a cashier's check is actual production of goods for interstate commerce. Either argument, it would seem, must end in the conclusion that there no longer is such a thing as interstate commerce as it has been known through the generations, but interstate commerce has given way in its entirety to production of goods for interstate commerce. If because banking is necessary to production, therefore banking is production, then, since all business activities in modern economic society are dependent and interdependent upon one another, it must follow that all business activity, whether removed once, twice or a dozen times, becomes production of goods for interstate commerce. If the drawing of a cashier's check is the production of goods, then by the same token the writing of a letter of credit, or indeed the writing of any letter which evidences some business obligation, is production and again in its final analysis the petitioner's argument means that every business letter becomes production and there is no longer commerce, but only production.

The argument completely loses sight of the realities of the situation. The argument supposes that there are no longer such things as instrumentalities of commerce,

but only production. It loses sight of the fact that the debates in Congress specifically refer to both interstate commerce and the production of goods for interstate commerce. It loses sight of the fact that the definition of the word "goods" in the Act obviously relates to tangible manufactured products, and that the definition in the Act of the word "produced" obviously relates to tangible articles that are manufactured, mined or otherwise produced. The petitioner cannot blow both hot and cold. After spending a good portion of his petition to argue that banking is commerce within the definition of "commerce", as found in the Act, which by definition includes trade, commerce, transportation or communication among the several states, he then argues that banking is not commerce but is production. If banking is either one or the other, it obviously is commerce and not production.

Again the facts in *Johnson* v. *Dallas Downtown Development Co.* are in point. In that case, as noted above, the building was occupied by branch offices of nationally known companies engaged in production and distribution, as Pillsbury Flour Mills Company, American Blower Company, Fuller Brush Company, Charles Scribner's Sons, Western Electric Company, the manufacturers of Old Dutch Cleanser, Lipton's Tea, Maxwell House Coffee and Welch's Grape Juice. One of the tenants was a news collecting and disseminating agency. Other tenants included insurance companies, general contractors and engineers building and supervising construction outside of Texas, a company engaged in making insurance investigations and reports. The tenants in the case at bar, other than the First National Bank itself, the owner of the building, were dealers in securities, lawyers, coal merchants, accountants, management engineers, members of stock exchanges, etc. (10). If banking can possibly be construed to be production then *a fortiori* the work per-

formed by the various tenants in the *Johnson* case is much nearer a realistic concept of the production of goods of a physical and tangible nature than banking.

Even assuming *arguendo*—by a long stretch of the legal imagination—that banking is "producing" in the sense of manufacturing, mining, etc., still the work of a night porter is so far removed, it would seem, as to most certainly fall within that outer fringe of the orbit described by Mr. Justice FRANKFURTER in *Kirschbaum Co. v. Walling,* where at page 525 he wrote:

> "But because some employees may not be within the Act even though their activities are in the ultimate sense 'necessary' to the production of goods for commerce, * * *"

The debates of Congress indicate quite definitely that in dealing with the term "production of goods for commerce" and in dealing with the definitions of "goods" and "producing", Congress was dealing with the manufacture and the mining of tangible materials, and was not trying to destroy the distinction between interstate commerce and production of goods for interstate commerce.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Of Counsel.

APPENDIX

Opinion of Court of Appeals

(290 N. Y. 195)

LEWIS, *J.* The plaintiff-respondent has thus far been successful in the prosecution of a claim against his employer, the appellant bank, for overtime compensation which he asserts is due him under the maximum hours provision of the Fair Labor Standards Act. (52 Stat. 1060, ch. 676 [June 25, 1938]; U. S. Code, tit. 29, § 201 *et seq.*)

The case comes to us on an agreed statement of facts (Civ. Prac. Act, § 546) from which it appears that the plaintiff was employed by the defendant bank on November 29, 1937, as a night porter, his duties being to clean portions of the defendant's twenty-one story building at No. 2 Wall Street in the City of New York. Of the twenty-one stories the first four, two mezzanines and two basements were occupied by the defendant as banking quarters, the upper seventeen stories being rented to tenants. It was incumbent upon the defendant's building superintendent to arrange each night for the cleaning of the entire building from top floor to basement. To that end there were employed eleven porters who cleaned first the defendant's banking quarters and then the upper floors occupied by tenants. The plaintiff was in the appellant's employ from November 29, 1937 until he voluntarily left on April 15, 1939. In the early period of his employment —both before and after the effective date of the Fair Labor Standards Act—the plaintiff did considerable work in the defendant's banking quarters, dusting and cleaning tables, chairs and office furniture or scrubbing floors and stairs. During the later period of his employment he spent the greater portion of his working hours cleaning public corridors and washrooms on the upper floors.

The Fair Labor Standards Act is a comprehensive legislative scheme designed by Congress to prevent the ship-

ment in interstate commerce of commodities produced in the United States under labor conditions which, as respects wages and hours, fail to conform to standards set up by the Act. It prescribes a 44-hour week. The plaintiff received a weekly wage of $27, or an average of 56¼ cents an hour figured on the basis of a 48-hour week. Subsequent to the effective date of the Act and during fifteen out of twenty-five weeks after the Act became effective, the plaintiff worked forty-eight hours a week. He claims to be entitled to overtime compensation in the amount of $50.63, plus a like amount as liquidated damages and reasonable attorney's fees and costs.

The defendant resists the demand asserting that upon the agreed facts the Fair Labor Standards Act is inapplicable to the plaintiff's claim and asks for its dismissal. The plaintiff has been awarded judgment at the Appellate Division (unanimous) in the amount claimed for overtime compensation plus liquidated damages. The present appeal is by leave of the Appellate Division, upon the ground that a question of law is involved which merits review by this court.

The Fair Labor Standards Act, (§ 7, subd. a) provides in part: "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—(1) for a work-week longer than forty-four hours during the first year from the effective date of this section, * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

There seems to be no question that the federal statute casts upon the plaintiff the burden of proving that in the performance of work for which he was employed by the defendant he was engaged in interstate commerce or in

the production of goods for interstate commerce during the period of asserted overtime employment. (*Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88.)

In the argument before us counsel for the plaintiff conceded that dusting and cleaning, as performed under ordinary circumstances, do not constitute interstate commerce. But it is said that when, as in the present case, the functions of dusting and cleaning are performed by one as an employee of a bank, the business of which in part is interstate commerce, the employee is engaged in interstate commerce. The plaintiff's argument is that his labors served to facilitate work performed in the defendant's private banking quarters where commerce starts—where specie and currency are shipped to points outside the State, where credit is entered and where those other services are rendered which are within that wide range of transactions common to commercial banking.

The defendant, for the purpose of the argument only, concedes that at least a part of the banking services performed in its banking quarters constitutes interstate commerce. It contends, however, and the Appellate Division has recognized that this "* * * is not a case where the employee was in anywise engaged in the production of goods for commerce." (264 App. Div. 585, 586.) Accordingly the defendant's argument goes to the narrow question whether the plaintiff, at the time of his overtime employment, was "*engaged in*" interstate commerce within the intended meaning of section 7 (subd. a) of the Act.

In support of its position we are told by the defendant that, even upon the assumption that its banking business is interstate commerce, the plaintiff has failed upon the record before us to show that the character of his work of cleaning and dusting bore such a relation to the defendant's banking activities as to justify a finding that plain-

tiff's activities themselves constituted interstate commerce. In other words the defendant, as the employer, does not stress the nature of its business. Rather does it place emphasis upon the character of work done by the plaintiff as its employee—thus conforming with the rule that "* * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities." (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524.)

In reaching a decision favorable to the plaintiff the Appellate Division recognized the fact that Congress had defined certain words and phrases as used in the Act. The statute provides (§ 3, subd. [j]) that "For the purposes of this Act an employee shall be deemed to have been engaged in *the production of goods* if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation *necessary* to the production thereof, in any State." (Emphasis supplied.) But the definition of "commerce" (§ 3, subd. [b]), as that word is used in the Act, is not so broad in scope: "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." The Appellate Division determined that there is no substantial distinction between the two categories of employment described by those statutory definitions and ruled that Congress did not intend to differentiate between the two types of employment thus defined. In other words, in construing section 7 (subd. a) of the Act, the Appellate Division seems to have combined the two definitions, quoted above, by transposing the word "necessary" from its context in the definition of "production of goods" to the definition of "commerce." It has thus produced a resulting composite definition which it has adopted as the basis for its ruling that employees who are engaged in activities

"necessary"—not to the *"production of goods"* but—to *"interstate commerce,"* are entitled to the benefit of the Act. But the statute does not expressly so state. To the contrary, by defining words and phrases used in the Act, Congress made clear its intention to distinguish between employees *engaged in interstate commerce* and those engaged in the *production of goods for interstate commerce.*

We may not disregard the definitive language thus employed; nor may we by judicial construction give effect to an assumed congressional intent. When by definition Congress differentiated between "commerce" and "production of goods for commerce," we may not assume it was wholly without purpose. (*Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 366.) "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." (*Federal Trade Comm.* v. *Bunte Brothers, Inc.,* 312 U. S. 349, 351.) Furthermore, the legislative history of the enactment of the Fair Labor Standards Act indicates an effort by Congress to restrict the scope of the Act rather than to extend the limits of its field of operation. (See *Kirschbaum* v. *Walling, supra,* pp. 522, 523.)

We think that in framing section 7 (subd. a) of the Act, Congress intended definitely to distinguish between the scope of those categories of employees which it described as being "engaged in commerce" and those engaged "in the production of goods for commerce." The phrase "in commerce" was not intended to include within its scope that wide field of activities which remotely *affect* interstate commerce. Whenever Congress, acting under the commerce clause, has wanted to embrace that broader field it has definitely expressed that purpose. Among many examples of such explicit phrasing is found section 10 (subd. a) of the National Labor Relations Act (49 Stat. 449-457; U. S. Code, tit. 29, §§ 152 [7], 159 [c], 160 [a])

where power was given to the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice * * * *affecting* commerce." (Emphasis supplied.) In that connection the Supreme Court of the United States in two recent cases—*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 and *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (decided January 18, 1943)—has pointed out that while Congress saw fit in the National Labor Relations Act (*supra*), to extend federal control to activities "*affecting commerce,*" it chose to confine the application of the Fair Labor Standards Act within narrower limits. It was that restriction to which the same court had previously referred when, in considering the Fair Labor Standards Act, it said—"The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied." (*Kirschbaum Co.* v. *Walling, supra,* pp. 522, 523.) "The question of the Act's coverage depends on the special facts pertaining to the particular business." (*Walling* v. *Jacksonville Paper Co., supra,* p. 572.)

In our endeavor to interpret the phrase "engaged in commerce" we adopt and apply to our present problem the "practical test" suggested in *Overstreet* v. *North Shore Corp.*, 317 U. S. ..... (decided Feb. 1, 1943)—Was the plaintiff's work of dusting and cleaning the defendant's banking quarters so closely related to interstate commerce as to be "in practice and in legal contemplation a part of it." See also *Pedersen* v. *Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 151; *Shanks* v. *Delaware, L. & W. R. R. Co.*, 239 U. S. 556, 560.) By the application of that test we think that one of those "areas" which Congress chose not to occupy when it fixed the scope of section 7 (subd. a) was employment such as the plaintiff's. It is our conclusion that the cleaning operations which plaintiff was required to perform in defendant's banking quarters were not so closely related to the many banking services

performed there that we can say as a matter of law that plaintiff's cleaning was a part of such banking services and therefore that he was "*engaged in*" interstate commerce. The plaintiff's work of cleaning and dusting the quarters in which the functions of banking are performed, although it may contribute remotely to the comfort and convenience of those whose services are vital to its business, is not a step in the process of banking. Indeed, as we consider the activities of those who conduct the vital functions by which the business of the defendant bank is accomplished, the essential characteristics of that portion of its banking service which is interstate commerce are lost before we reach the position held by the plaintiff. If, under the guise of construing section 7 (subd. a), we extend its application beyond those employees who are "engaged in" interstate commerce and include that vast number of employees whose work, like that of the plaintiff, only remotely *affects* commerce, we would extend the operation of the Act beyond its intended scope.

We are not unmindful that in *Kirschbaum* v. *Walling* (*supra*), the provisions of section 7 (subd. a), with respect to "the production of goods for commerce," have—because of the liberal definition of the phrase "production of goods" (§ 3 [j])—been given a broad construction. But that case, as we view it, is not controlling here where the plaintiff does not claim we are dealing with a problem involving "the production of goods for commerce."

The judgment of the Appellate Division should be reversed and judgment directed in favor of the defendant on the submitted controversy, with costs in this court.

LEHMAN, Ch. J., FINCH, RIPPEY, CONWAY and DESMOND, JJ., concur; LOUGHRAN, J., dissents and votes to affirm on the opinion of the Appellate Division.

Judgment accordingly.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 170

ARTHUR H. STOIKE, PETITIONER

v.

FIRST NATIONAL BANK OF THE CITY OF NEW YORK

Nos. 322–324

ATTILLIO SEMERIA, ET AL., PETITIONERS

v.

THEODORE ROSENBERG, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

These are actions by employees to recover compensation under the Fair Labor Standards Act of 1938. The courts below held that employees

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performing janitorial work in large national banks engaged in interstate commerce were not employed in activities subject to the provisions of the Act.[1] The banks involved in the two actions are the First National Bank of the City of New York, with resources of $750,000,000, the American Trust Co., with resources of $350,000,000, the Wells Fargo & Union Trust Co., with resources of $340,000,000, and the Anglo California National Bank of San Francisco, with resources of $230,000,000 (Moody's Manual of Investment Banks (1941), p. a72). The banks all carried on extensive commercial intercourse with cities throughout the United States and in nations all over the world.

In *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court held that employees performing the same type of work as did petitioners in buildings in which there is production for commerce are subject to the Fair Labor Standards Act. Inasmuch as the banks involved in these cases prepare various types of commercial paper sent in interstate commerce, they can be said to be engaged in

[1] In the *Semeria* case both courts below found that the banks were engaged in interstate commerce (45 F. Supp. 128, 131–134; 6 Wage Hour Rept. 859, 860. Cf. *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624 (C. C. A. 9), certiorari denied, 318 U. S. 791, 792). In the *Stoike* case it was conceded by the bank, for purposes of the case, that it was engaged in interstate commerce (48 N. E. (2d) 482, 484).

the production of goods for commerce within the meaning of the statutory definitions. See Sections 3 (i) and (j). But even apart from this, if we assume only that they are engaged *in* interstate commerce, it is anomalous to hold that janitorial employees in buildings the occupants of which are not in interstate commerce but only producing for it are subject to the Act, while employees in buildings the occupants of which are actually in interstate commerce are not. We do not think that such an unusual intention can be attributed to Congress.

The majority opinions[2] below in these cases are contrary to the views consistently expressed by the Administrator of the Wage and Hour Division[3] and, if sustained, will exclude from the coverage of the Act many thousands of maintenance employees in bank and office buildings. At the present time, cases involving the same issues are pending in the Second, Seventh, Eighth, and

[2] In both cases the trial courts held for petitioners and were reversed by divided appellate tribunals.

[3] See 5 Wage Hour Rept. 813. In both of the instant cases the Administrator filed briefs amicus curiae in the courts below. He has instituted injunction actions in similar cases presently pending in the District of Minnesota (*Walling* v. *Conklin-Zonne-Loomis Co.*, and *Walling* v. *First National Bank of St. Paul*), in the Eastern District of Virginia (*Walling* v. *United Owners Realty Corp.*), and in the Middle District of Tennessee (*Walling* v. *Third National Bank of Nashville*), and thousands of dollars in restitution have been paid to maintenance employees in buildings similar to those involved here.

Tenth Circuits,[4] and there are fifty-five such cases pending in New York, thirty-five of them in the Federal courts. The pendency in State and lower Federal courts of numerous actions involving similar situations indicates the need for settlement of the issue by this Court.

For these reasons, we think that the question presented is sufficiently important to warrant the granting of the writ.

Respectfully submitted.

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[4] *Rucker* v. *First National Bank of Miami, Oklahoma* (C. C. A. 10); *Lofther* v. *First National Bank of Chicago* (C. C. A. 7); *Convey* v. *First National Bank of Omaha* (C. C. A. 8); *Callus* v. *Ten East 40th Street* (C. C. A. 2). See also *Tate* v. *Empire Building Corp.*, 135 F. (2d) 743 (C. C. A. 6), petition for writ of certiorari now pending, No. 297, involving maintenance employees in an office building; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287 (C. C. A. 5), certiorari denied, 318 U. S. 790, holding that maintenance employees in an office building are not engaged in commerce; and *Burton* v. *Zimmerman*, 131 F. (2d) 377 (C. C. A. 4), which appears to be in conflict with the instant cases in that the court there in a *per curiam* opinion denied a motion to dismiss a complaint filed by a maintenance employee in a bank building on the ground that such an employee may be able to show that he is engaged in commerce in much the same manner that the employees in the *Kirschbaum* case (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517) showed they were engaged in production for commerce.

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